

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No.**77-1680**

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,
vs.
GARY DeFILLIPPO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF
THE STATE OF MICHIGAN

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TABLE OF CONTENTS

	Page
Index of Authorities	ii
Opinions Below	2
Statement of Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement of Facts.	4
Reasons for Granting the Writ	5
Conclusion	11
Appendix "A" Opinion of the Michigan Court of Appeals	12
Appendix "B" Order of the Michigan Supreme Court	16

INDEX OF AUTHORITIES

Page

CASES

<u>Almedia-Sanchez v United States</u> 413 US 266; 96 S Ct 2535; 37 L Ed 2d 596 (1973)	6
<u>Amsterdam, Perspectives On The Fourth Amendment</u> 58 Minn L Rev 349 (1974)	9
<u>Michigan v Tucker</u> 417 US 433; 94 S Ct 2357; 41 L Ed 2d 182 (1974)	8
<u>People v Carpenter</u> 68 Mich App 81 (1976)	7
<u>People v Gonzales</u> 356 Mich 247 (1959)	7
<u>People v Harper</u> 3 Mich App 316 (1966)	7
<u>People v Smith</u> 393 Mich 432 (1975)	7
<u>People v Solomon</u> 108 Cal Rptr 867, 33 CA 3d 429 (1973) cert den 415 US 951; 39 L Ed 2d 567; 94 S Ct 1476	11
<u>People v Weger</u> 251 CA 2d 584; 59 Cal Rptr 661 (1967)	10
<u>Powell v Stone</u> 507 F2d 93 (CA 9, 1974)	8-9
<u>Stone v Powell</u> 428 US 465; 96 S Ct 3037; 49 L Ed 2d 1067 (1976)	5

<u>Terry v Ohio</u> 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968) . . .	2, 10-11
<u>United States v Calandra</u> 414 US 338; 94 S Ct 613; 38 L Ed 2d 561 (1974) . . .	8
<u>United States v Carden</u> 529 F2d 443 (CA 5, 1976)	5, 8
<u>United States v Janis</u> ___ US ___ 49 L Ed 2d 1046 (1976)	8-9
<u>United States v Kilgen</u> 445 F2d 287 (CA 5, 1971)	5, 8
<u>United States v Peltier</u> 422 US 531; 45 L Ed 2d 374; 95 S Ct 2313 (1975) . . .	6, 8-9

US CONSTITUTION

US Const, Am IV	3
US Const, Am XIV	3

STATUTES

MCLA 335.341(4)(b); MSA 18.1070(41)(4)(b)	4
MCLA 750.227.	7

OTHER AUTHORITIES

28 USC, 1257(3)	2
Cal. Penal Code, S. 647 (3)	10

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Now Comes William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by Edward R. Wilson, Chief Appellate Attorney, and Timothy A. Baughman, Assistant Prosecuting Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of Michigan, entered in the above-entitled cause on December 6, 1977, leave to appeal denied by the Michigan Supreme Court on May 2, 1978.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported at 80 Mich App 197 (1977) NW2d (1977), and is appended as Appendix "A". The order of the Michigan Supreme Court denying Petitioner's application for leave to appeal is appended as Appendix "B".

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on December 6, 1977. The Michigan Supreme Court denied Petitioner's application for leave to appeal on May 2, 1978. The jurisdiction of this Court is invoked under 28 USC, Sec. 1257(3).

QUESTIONS PRESENTED

I.

Is an arrest made in good faith reliance on an ordinance which has not been declared unconstitutional a valid arrest regardless of the ultimate validity of the ordinance?

II.

If the answer to question I is "No", is an ordinance which provides that it is unlawful for one validly stopped pursuant to *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968) to refuse or be unable to provide verifiable proof, written or oral, of his identity unconstitutional as being vague and also a violation of the Fourth Amendment probable cause standard?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Two Detroit Police Officers received a radio call to investigate two allegedly drunken persons in an alley. Upon arrival at the alley the officers found respondent and a female who had her pants down. She was intoxicated; respondent did not appear to be so. When asked for identification respondent replied that he was Sergeant Mash, a Detroit Police Officer. When asked his badge number he then stated that he worked for a Sergeant Mash. He was arrested for failure to produce identification, handcuffed, and searched, the search producing marijuana. At the station phencyclidine was found in a pack of defendant's cigarettes.

Respondent was charged with possession of phencyclidine. MCLA 335.341(4)(b); MSA 18.1070(41)(4)(b). A motion to suppress evidence was denied, and on interlocutory appeal the Michigan Court of Appeals held the ordinance under which respondent was initially arrested unconstitutional (Detroit City Code 39-1-52.3). The court also rejected petitioner's argument that the officer's good faith reliance on the ordinance which had not been declared unconstitutional at the time of the arrest rendered the arrest lawful. On May 2, 1978, the Michigan Supreme Court denied petitioner's application for leave to appeal.

REASONS FOR GRANTING THE WRIT

I.

The issue as to whether an arrest made in good faith reliance on an ordinance which had not been declared unconstitutional at the time of the arrest is a valid arrest, rendering evidence found in a search of the person pursuant to the arrest admissible, is an issue which has split several of the federal circuits, and which has once before been before this Court (though the question was not reached). Stone v Powell, 428 US 465; 96 S Ct 3037; 49 L Ed 2d 1067 (1976).

The Fifth Circuit has consistently held such arrests to be lawful. In United States v Kilgen, 445 F2d 287 (CA 5, 1971), defendant confessed to a crime while being held under a vagrancy ordinance which was subsequently held to be unconstitutional. The court held:

Had Kilgen been convicted for vagrancy, that conviction would necessarily have been reversed when the court held the vagrancy ordinance unconstitutional. But over-turning a conviction due to an invalid statute does not automatically render the previous arrest and detention illegal absent some showing that police officials lacked a good faith belief in the validity of the statute. See Pierson v Ray,

. . . No legitimate interest would be served by excluding the confession to the separate crime of stealing postage stamps because we now find the vagrancy ordinance invalid. We therefore hold that the confession to the separate offense was admissible because it was obtained while Kilgen was detained and charged in good faith reliance on an ordinance not yet held invalid.

The defendants in United States v Carden, 529 F2d 443 (CA 5, 1976) were convicted of breaking and

entering a government building, and receiving, concealing and retaining stolen government property. They challenged the search incident to arrest as occurring pursuant to an arrest for a vagrancy statute which they attacked on constitutional grounds. The Court did not find it necessary to reach the constitutional question regarding the statute:

Without intimating any opinion on the constitutionality of the Anniston loitering ordinance, we must reject the Carden's first contention. This Court has held more than once that an arrest made in good faith reliance on a statute not yet declared unconstitutional is valid regardless of the actual constitutionality of the ordinance (citations omitted).

While appellants would be entitled to attack the constitutionality of any convictions under the Anniston ordinance, "there is no bar to the use of evidence of other crimes obtained during incarceration for violation of a law which was valid when the arrest was made." 529 F2d at 445.

This Court had occasion to deal with a similar question in United States v Peltier, 422 US 531; 45 L Ed 2d 374; 95 S Ct 2313 (1975). This Court's view of the Officer's conduct is instructive. This Officers, border patrol agents, conducted a warrantless auto search without probable cause of an auto in close proximity to the border. Such border stops were held unconstitutional in Almedia-Sanchez v United States, 413 US 266; 96 S Ct 2535; 37 L Ed 2d 596 (1973), which was decided subsequent to the conduct complained of, though the issue had been preserved by Peltier. A majority of the Court held:

It was in reliance upon a validly enacted statute, supported by longstanding administrative regulations and continuous judicial approval, that border agents stopped and searched respondent's automobile. Since the first roving border patrol case to be decided

may not reasonably rely upon any legal pronouncements emanating from sources other than this Court, we cannot regard as blameworthy those parties who conform their conduct to the prevailing statutory or constitutional norm (citations omitted). If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. . . . we conclude that nothing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it, requires that the evidence here be suppressed, even if we assume that respondent's Fourth Amendment rights were violated by the search of his car. (emphasis added).

An analagous Michigan case is People v Carpenter, 69 Mich App 81 (1976). Defendant was convicted of carrying a pistol in a motor vehicle. The vehicle was searched and the weapon found after the officer had observed a rifle case in plain view. On appeal, defendant contended that since People v Smith, 393 Mich 432 (1975), decided subsequent to the search, had held that a rifle was not a dangerous weapon within the meaning of MCLA 750.227, the search was unreasonable as lacking probable cause. The Court noted that only the facts, circumstances, and information known to the officers at the time of the seizure should be considered (People v Gonzales, 356 Mich 247 (1959)), and held that since at the time of the search case law held that a rifle was a dangerous weapon within the meaning of MCLA 750.227 (e.g. People v Harper, 3 Mich App 316 (1966)), the search was reasonable.

This Court has had frequent occasion of late to examine the exclusionary rule, and has consistently focussed upon whether application of the rule would deter willful or negligent police conduct which has violated some right of the accused. See United States v Calandra, 414 US 338, 348; 94 S Ct 613, 620; 38 L Ed 2d 561 (1974) (the exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved"); Michigan v Tucker, 417 US 433; 94 S Ct 2357; 41 L Ed 2d 182 (1974) ("where the official action was pursued in complete good faith, the deterrence rationale loses much of its force"); United States v Janis, ___ US ___ 49 L Ed 2d 1046, 4056 (1976). ("The Court . . . has established that the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct.'"); and United States v Peltier, *supra*.

The Michigan Court of Appeals in the instant case declined to follow Carden and Kilgen, citing Powell v Stone, 507 F2d 93, 98 (CA 9, 1974), *rev'd on other grounds*, 428 US 465; 96 S Ct 3037; 49 L Ed 1067 (1976). There is unquestionably a split of opinion among the federal circuits; however, petitioner submits that the Ninth Circuit's rationale is dubious given the subsequent United States Supreme Court cases cited, *supra*. It is interesting that certiorari was granted on the precise issue (whether an arrest pursuant to an ordinance later declared to be unconstitutional is a valid arrest) in Powell v Stone, *supra*, where the Ninth Circuit held such arrests invalid. The issue was not reached in this Court's opinion because of its decision on the habeas corpus issue. Certiorari was denied in Carden and Kilgen, where the arrests were upheld. While these observations are not compelling, they are worth noting. Further, several of the Ninth Circuit's premises - that the public interest demands that legislatures be deterred from passing unconstitutional statutes, and that the "imperative of judicial integrity" requires exclusion even when no deterrent effect on future police conduct would be effected - have been substantially eroded by the Supreme Court. See United States v Janis, *supra*, and Stone v Powell itself, at 1083, fn 23:

As we recognized last term, judicial integrity is 'not offended if law enforcement officials reasonably believe in good faith that their conduct was in accordance with the law even if decisions subsequent to the search and seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted under the constitution.' United States v Peltier . . . (citation omitted).

The Ninth Circuit's holding that the exclusionary rule must be employed to deter legislatures was also undercut by Janis and Powell; "The Court . . . has established that the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct.'" (emphasis added). Janis, 49 L Ed 2d at 1056. See also Amsterdam, Perspectives On The Fourth Amendment, 58 Minn L Rev 349, 369 (1974) ("... the regulation of police behavior is what the Fourth Amendment is all about.").

Applying the test of Peltier, *supra*, to the instant case, it is clear that application of the exclusionary rule serves no valid purpose. There being a split among federal circuits, petitioner submits that plenary review by this Court is needed.

II.

Petitioner believes that the Michigan Court of Appeals erred in reaching the issue of the constitutionality of the ordinance, as questions of the constitutionality of statutes should not be reached unless necessary, and petitioner argues that the arrest was valid regardless of the constitutionality of the ordinance. (See Issue II) If the answer to Question I is "No", then the issue of the constitutionality of the ordinance must be faced.

People v Weger, 251 CA 2d 584; 59 Cal Rptr 661 (1967) involved a statute declaring one to be guilty of loitering from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such to indicate to a reasonable man that the public safety requires such identification." Cal. Penal Code, S. 647 (3) The Court rejected vagueness, self-incrimination and probable cause challenges to the identification portion of the statute. Analogizing to fingerprint, voiceprint, lineup and other such cases the court observed that "the silence here is mere nonassertive conduct; it is not a declaration but a failure to offer an explanation under circumstances which call for one." The court thus found no right to refuse to give non-testimonial information.

As to the probable cause argument, and the argument in the instant case that the ordinance makes "criminal conduct which is innocent," the court noted that stops are justified on information short of probable cause. Terry v Ohio, 392 US 1, 88 S Ct 1868; 20 L Ed 2d

889 (1968). The ordinance in the instant case requires a valid Terry stop before the identification portion of the ordinance applies. To say that the ordinance is vague or "undercuts" probable cause is but to disagree with Terry, and not in conformance with it. Finally, it should be noted that the Court of Appeals erred in stating that the ordinance allows "full searches on suspicion." The ordinance allows a Terry stop, and makes it a crime to refuse to identify oneself after a valid stop. The search is incident to the refusal to identify, not the stop. See, also People v Solomon, 108 Cal Rptr 867, 33 CA 3d 429 (1973), cert den 415 US 951; 39 L Ed 2d 567; 94 S Ct 1476.

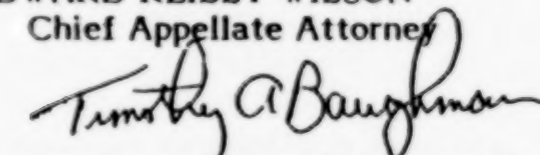
CONCLUSION

It is respectfully submitted that for the reasons outlined above plenary review should be granted.

Respectfully submitted,

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Dated: May 5, 1978.

APPENDIX "A"

OPINION OF THE MICHIGAN COURT OF APPEALS

BEFORE: T.M. Burns, P.J., and R.B. Burns and W.R. Brown, JJ. R.B. BURNS, J.

Defendant was charged with possession of a controlled substance, phencyclidene. MCLA 335.341(4)(b); MSA 18.1070 (41)(4)(b). Prior to trial he moved to suppress evidence obtained in a search of his person and to quash the information. The motion was denied and we granted an interlocutory appeal.

The facts indicate that two Detroit police officers received a radio call to investigate two allegedly drunken persons in an alley. Upon their arrival at the alley, the officers found defendant and a companion. The intoxicated companion was arrested for disorderly conduct. Defendant did not appear intoxicated, but when he was asked for his identification, he replied that he was Sergeant Mash, a Detroit police officer. When asked for his badge number, defendant replied that he was working for Sergeant Mash. Defendant was then arrested for failure to produce identification, handcuffed, and searched. Marijuana was found immediately, and phencyclidene was found later at the station in a pack of defendant's cigarettes.

It is defendant's theory that the Detroit ordinance which allows a police officer to arrest an individual for failure to produce identification is unconstitutional, that the search incident to his arrest was therefore unlawful, and that the evidence must be suppressed. It is plaintiff's theory that we should avoid the issue of the constitutionality of the ordinance, because even if the ordinance is unconstitutional, the police officer's good faith reliance thereon would preclude application of the exclusionary rule. The purpose of the exclusionary rule is to deter unlawful

police conduct, and "where official action was pursued in complete good faith, the deterrence rationale loses much of its force", Michigan v Tucker, 417 US 433, 447; 94 S Ct 2357; 41 L Ed 2d 182, 194 (1974). See United States v Carden, 529 F2d 443 (CA 5, 1976), United States v Kilgen, 445 F2d 287 (CA 5, 1971).

We cannot subscribe to plaintiff's theory. If, as defendant argues, the ordinance is void for vagueness, subject to arbitrary and discriminatory application, and used as a pretext for unlawful search and seizure, suppression of evidence obtained pursuant to a search incident to arrest thereon will deter unlawful police conduct, and the exclusionary rule should therefore apply. See Powell v Stone, 507 F2d 93, 98 (CA 9, 1974), rev'd on other grounds, 428 US 465; 96 S Ct 3037; 49 L Ed 2d 1067 (1976), United States ex rel. Newsome v Malcolm, 492 F2d 1166, 1174-1175 (CA 2, 1974), Hall v United States, 459 F2d 831, 841-842 (DC Cir, 1972).

At the time of defendant's arrest, Detroit City Code § 39-1-52.3 read as follows:

"When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity the police officer may transport him to the nearest precinct in order to ascertain his identity."

The ordinance has been slightly amended since defendant's arrest, but there are no significant changes.

The ordinance is void for vagueness.

First, it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden * * *." United States v Harris, 347 US 612, 617; 74 S Ct 808; 98 L Ed 989, 996 (1954), see Papachristou v City of Jacksonville, 405 US 156; 92 S Ct 839; 31 L Ed 2d 140 (1972). An innocent citizen cannot generally know when a police officer has reasonable cause to believe that his behavior warrants further investigation for criminal activity, and therefore cannot know when refusal to identify himself will be a crime. Nor does the ordinance define which of today's numerous forms of identification will satisfy a police officer's desire for verifiable documents. This lack of specificity "encourages arbitrary and erratic arrests", Papachristou v City of Jacksonville, *supra*, by delegating to police officers the determination of who must be able to produce what kind of identification.

Second, the ordinance seeks to make criminal conduct which is innocent. Papachristou v City of Jacksonville, *supra*, Detroit v Sanchez, 18 Mich App 399, 401-204; 171 NW2d 452, 453 (1969).

"Personal liberty, which is guaranteed to every citizen under our Constitution and laws, consists of the right of locomotion,--to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens. One may travel along the public highways or in public places; and while conducting themselves in a decent and orderly manner, disturbing no other, and interfering with the rights of no other citizens, there, they will be protected under the law, not only in their persons, but in their safe conduct. The Constitution and the laws are framed for the public good, and the protection of all citizens, from the highest to the lowest; and no one may be restrained of his liberty, unless he has transgressed some law. Any law which would place the keeping and safe conduct of

another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our Constitution guaranteed." Pinkerton v Verberg, 78 Mich 573, 584; 44 NW 579, 582-583 (1889).

While police may under certain circumstances intrude upon a person's privacy by stopping him and asking questions, Terry v Ohio, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), there can be no requirement that the person answer. "[W]hile the police have a right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." Davis v Mississippi, 394 US 721, 727n.6, 89 S Ct 1394, 1397n.6, 22 L Ed 2d 676, 681n.6 (1973). Accord, Terry v Ohio, *supra*, at 34, 20 L Ed 2d at 913 (White, J., concurring).

Third, the ordinance undercuts the probable cause standard of the Fourth Amendment. Papachristou v City of Jacksonville, *supra*; People v Berck, 32 NY2d 567, 300 NE2d 411, 347 NYS 2d 33 (1973). A police officer may make only a limited search of a person he has stopped on suspicion, and then only if he has reason to believe the person is armed and dangerous. Terry v Ohio, *supra*. The Detroit ordinance sanctions full searches on suspicion, without regard for dangerousness, of those persons whose activities fall within the vague parameters of the ordinance.

Since the ordinance is void, the search incident to arrest for violation of the ordinance was unlawful. The evidence should have been suppressed and the information quashed.

Reversed.

¹The amendment, Detroit Ordinance No 158-11 (October 19, 1976) makes clear that refusal to identify oneself is a crime. This was implicit in the ordinance as it read at the time of defendant's arrest, since the ordinance authorized arrest for failure to identify oneself.

APPENDIX "B"

ORDER OF THE MICHIGAN SUPREME COURT

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 28th day of April in the year of our Lord one thousand nine hundred and seventy-eight.

Present: The Honorable Thomas Giles Kavanagh, Chief Justice, G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

State of Michigan — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 1st day of May in the year of our Lord one thousand nine hundred and seventy-eight.

/s/ Corbin Davis
Deputy Clerk.